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Citation

Cass R. Sunstein, Hard Defamation Cases, 25 Wm. & Mary L. Rev. 891 (1984).

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Cass R. Sunstein, *Hard Defamation Cases*, 25 Wm. & Mary L. Rev. 891 (1984),
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HARD DEFAMATION CASES

CASS R. SUNSTEIN*

I. INTRODUCTION

Even twenty years after *New York Times Co. v. Sullivan*,¹ defamation continues to raise some of the most vexing problems in all of constitutional law. Perhaps this should be unsurprising. Defamation cases pose an unusual conflict between two categories of rights, both with a constitutional basis, and both with significant theoretical and popular support. On the one hand is the interest in free speech. Fear of liability for defamation may have a significant deterrent effect on free expression.² On the other hand is the interest in protecting reputation. Notwithstanding *Paul v. Davis*,³ the reputational interest has always had⁴ and continues to receive protection⁵ as part of the "liberty" protected by the fourteenth amendment. But if the interest in free expression is allowed to defeat application of state libel laws in the great range of cases, reputational interests will be bereft of protection.

In retrospect, *New York Times* posed a relatively easy case in terms of both of the relevant interests. It will be recalled that the action was brought by a police commissioner in Montgomery, Alabama, alleging errors in an editorial advertisement about mistreat-

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1. 376 U.S. 254 (1964).

2. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50-53 (1971) (Brennan, J.); *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-83 (1964).

3. 424 U.S. 693 (1976). In *Paul*, local police officials had distributed leaflets containing the names and photographs of "active shoplifters," one of whom was the plaintiff. The Supreme Court held that harm to reputation was insufficient to invoke the protection of the due process clause. *Id.* at 712.

4. See generally Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

5. Since *Paul v. Davis*, the Court has adopted a "reputation plus" test for liberty, but the "plus" may be quite small. See *Owen v. City of Independence*, 445 U.S. 622 (1980); *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

ment of Martin Luther King, Jr., and his followers by the local police. The plaintiff was a public official, and issues of undoubted public import were involved. If the comments were actionable, there was a genuine risk of deterring discussion of public issues. The commissioner's office also necessarily involved high visibility. Even though public officials want to maintain their reputations, the demands of representative government require a certain "breathing space" for speakers.⁶ Finally, no facts about the commissioner's private life had been disclosed in the *New York Times* advertisement. In weighing the reputational interest against the interest in free speech, the Court's decision was clear.

Subsequent cases have posed much harder problems, in which the first amendment interest seems less compelling and the countervailing reputational interest much more powerful. It is to some of these subsequent cases that Franklin and Bussel address themselves. The authors resolve most of the disputed cases in favor of the speaker and against those asserting reputational interests. They attempt, in brief, to use *New York Times* as the basis for an attack on much of state libel law. Their claim is that their conclusions are not merely compatible with the decision, but that they "seem to flow necessarily from constitutional principles."⁷

I am concerned here with both methodological and substantive problems. How does one resolve the close cases that arise after decisions like *New York Times Co. v. Sullivan*? In this Commentary, I suggest that the authors are unpersuasive in suggesting that either the *New York Times* principle or the rationale on which it relies provides much guidance for the cases they attempt to resolve. The hard defamation cases go far beyond *New York Times*, and require resolution of difficult issues about the purposes of the constitutional protection of free speech.

II. AWARENESS AND FALSITY

A. Allocating the Burden

Franklin and Bussel discuss two principal issues. First, they ex-

6. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 272 (1964).

7. Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 825 (1984).

plore whether after *New York Times Co. v. Sullivan*, a plaintiff—whether public or private—has the burden of proving that the defendant knew that his statement was defamatory, and whether that burden must be carried by clear and convincing evidence. Such a requirement would be a significant supplement to the *New York Times* requirement that the plaintiff show that the defendant recklessly disregarded or had knowledge of the falsity of the defamatory statement. Second, the authors examine whether a plaintiff must show, in all contexts, that the defamatory statement is false. If so, the first amendment always protects true statements, no matter how damaging the disclosures; damaging statements that are not subject to forensic proof of falsity are also protected. Franklin and Bussel resolve these issues favorably to defendants, recommending a general requirement of proof of defamatory intent and also suggesting that the fact-opinion distinction be abolished in favor of a test focusing on whether the statement in question is falsifiable. Both of these recommendations carry substantial implications for defamation law.

Franklin and Bussel maintain that a requirement that the defendant knew of the defamatory nature of the statement in issue “logically stems from . . . *New York Times*.”⁸ The argument is essentially that the self-censorship concern of that case applies fully to statements of whose defamatory character the defendant is unaware. Fearful critics will avoid the risk of a lawsuit, thus generating the chilling effect that has often proved so important in constitutional discussion of libel law. In the authors’ view, a defendant may not be held liable for a defamatory statement even if he knows it is false, unless he also knows it is defamatory. Consequently, a person may circulate a deliberate lie about a person, public or private, yet remain constitutionally immune from a defamation suit if he does not also know that it is defamatory. The familiar example is a statement that Mr. Jones entered a hotel room with Ms. Smith, when the speaker did not know that Mr. Jones was married to someone else. Another example would be a statement that Jones is a “fascist,” or a “crook,” when the defendant intends to engage in hyperbole, but not to defame.

Although Franklin and Bussel are happy to follow what they

8. *Id.* at 834.

take to be the Supreme Court's lead in *New York Times*, they distinguish *Gertz v. Robert Welch, Inc.*⁹ insofar as it holds that private plaintiffs must be treated more sympathetically than plaintiffs who are public figures. Here too, they argue, the national commitment to the notion that we need "a very good reason to shift losses from the plaintiff to the defendant when the crucial behavior is speech" requires that the plaintiff—even a private plaintiff—show that the defendant had knowledge of the defamatory character of his statement.¹⁰ In addition, they claim that the extent of the first amendment interest compels the plaintiff to discharge that burden by clear and convincing evidence.¹¹

The argument proceeds similarly with respect to the second principal issue, the need for proof of falsity. There is a strong social interest in allowing communication of true statements. No such interest, to be sure, applies to false statements. But ambiguous statements and statements of opinion—those statements which cannot be proved false—do not fall in the same category as untruths. They too deserve constitutional protection insofar as they contribute to vigorous debate. Franklin and Bussel thus reach the broad conclusion that all statements that cannot be proved false are entitled to constitutional protection.¹² Under this approach, there is no need to distinguish between facts and opinions. The key test is falsifiability.

B. The Relevance of New York Times

These recommendations all have considerable appeal—especially to those who are firmly persuaded by *New York Times Co. v. Sullivan* itself. But I believe that the authors are mistaken in suggesting that the recommendations follow from that decision. It is not difficult to construct the grounds on which opposite conclusions might be urged, and to show that the conclusions are consistent with the *New York Times* reasoning and result.

The first problem is whether the first amendment is satisfied by a showing that the defendant acted with actual malice, or whether

9. 418 U.S. 323 (1974).

10. Franklin & Bussel, *supra* note 7, at 846.

11. *See id.* at 836-37.

12. *See id.* at 855.

the plaintiff must also show that the defendant was aware of the defamatory character of his statement. Suppose, for example, that a reporter writes that she saw the plaintiff enter a hotel room at night with John Smith. Suppose too that the defendant admits that she did not in fact see the plaintiff do any such thing, but that the defendant did not know that the plaintiff was married to Jones rather than Smith. The defendant has acted with actual malice within the meaning of *New York Times*, but she was unaware that her statement was defamatory.

There are two problems with the view that *New York Times* compels a conclusion that the defendant is in these circumstances protected from a libel action. First, it is surely plausible to read the case as balancing the relevant interests—protection of reputation and reduction of chilling effects on the media—in a way that is satisfied by the requirement of actual malice and that, for constitutional purposes, allows states freedom on the question of awareness of defamatory content. There would be nothing odd about a regime under which a necessary and sufficient condition for liability is that the plaintiff show the defendant's awareness of or reckless indifference to the falsity of the statement. Under such a regime, if the plaintiff can show that the defendant has made a statement falling in that category, the defendant assumes the risk that she will be held liable if the statement turns out to be defamatory. In short, those who circulate lies about others may be held liable if the lie happens to be defamatory.

To be sure, such a result might produce some self-censorship. But self-censorship is not an intrinsically bad thing. It all depends on the consequences, good or bad, that follow. As discussed in more detail below,¹³ the argument here is that in this fairly narrow category of cases—actual malice but no knowledge of defamatory content—the incremental increase in self-censorship has few disadvantages and significant advantages. People would be discouraged from circulating false statements. The resulting deterrence would apply to all false statements, even if they are nondefamatory, but it is unclear what is wrong with that.

The authors' response seems to be that this conclusion would be anomalous because it would pose an intolerable risk of a chilling

13. See *infra* text accompanying notes 20-28.

effect and would distinguish between the defendant's state of mind with respect to falsity and with respect to the defamatory character of the statement.¹⁴ But the anomaly is hard to see. Arguments about chilling effect operate at too high a level of generality to solve the particular question. In the abstract, they threaten to do away entirely with the tort of defamation, and no one seems to want to go that far. The question, again, is whether the chilling effect is good or bad in the circumstances. Moreover, there is nothing implausible about a distinction between the defendant's state of mind with respect to issues of falsity and his state of mind with respect to defamation. One might reasonably believe that the *New York Times* result adequately protects the relevant interest of the defendant, that the defendant ought to be forced to assume the risk of defamation, and that the alternative result would provide inadequate protection of the countervailing interest in reputation.

The second problem with the conclusion that all plaintiffs must prove knowledge of the defamatory nature of the statement is that it fails to distinguish between public and private plaintiffs or between matters that are of public importance and matters that are not. As suggested below, that distinction is a natural outgrowth of *New York Times*.¹⁵

It is also unclear that *New York Times* justifies the conclusion that true statements are always protected. Suppose, for example, that a magazine publishes a private fact about a private plaintiff—for example, that she is a homosexual or that she has cancer. Suppose too that the fact is one which the plaintiff has carefully attempted to keep quiet, that disclosure is injurious to the plaintiff's personal and professional relations, and that disclosure is not by any objective standard¹⁶ newsworthy or related to a matter of public importance. Is there not a strong argument that *New York Times Co. v. Sullivan* has absolutely nothing to say about that case? *New York Times Co. v. Sullivan* stemmed largely from a

14. See Franklin & Bussel, *supra* note 7, at 836-40.

15. See *infra* notes 29-33 and accompanying text.

16. There are familiar difficulties in generating objective standards by which to decide newsworthiness. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). But if the judgment of the reporter is conclusive on the matter, the necessary public/private distinction cannot be administered. In any event, the problem is largely one of line-drawing, and here as elsewhere the existence of intermediate cases is no reason to abandon a distinction.

conception of the first amendment akin to that popularized by Alexander Meiklejohn.¹⁷ The underlying notion was that where the affairs of public officials are involved, it is important to assure a certain amount of breathing space for journalists. That rationale does not accord constitutional protection to a writer who discloses true but private facts about a private person not involved in public affairs.¹⁸

Under similar reasoning, one might urge that the first amendment does not protect all statements that cannot be proved false. This conclusion flows easily from the suggestion that true statements are not necessarily protected by the first amendment. *Burton v. Crowell Publishing Co.*,¹⁹ on which Franklin and Bussel rely, is a good example. At issue in *Burton* was a cigarette advertisement purporting to show that the plaintiff—a private citizen—was exposing his genitals, and that the genitals were deformed. Franklin and Bussel urge that the court was wrong to conclude that the advertisement was actionable.²⁰ But that conclusion hardly follows from *New York Times Co. v. Sullivan*. The concern in *New York Times* was that seditious libel and analogous doctrines strike “at the very heart of democracy.”²¹ No such concern justifies the position taken by Franklin and Bussel with respect to all statements that are not demonstrably false. Some such statements will have nothing to do with seditious libel, or even with democracy in the ordinary sense, at all. They will instead bear on mundane issues of personal privacy and reputation. The concern that underlies *New York Times* is minimal or nonexistent. Moreover, the countervailing considerations—dealing with reputational interests and personal privacy—are extraordinarily powerful.

What I have said so far does not mean that Franklin and Bussel are wrong in their conclusions. It does suggest, however, that one

17. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), reprinted in A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 1-89 (1965).

18. In subsequent cases, however, the Court has protected speech that is at least some degree beyond this rationale. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (disclosure of name of rape victim).

19. 82 F.2d 154 (2d Cir. 1936).

20. See Franklin & Bussel, *supra* note 7, at 867-68.

21. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205.

needs a largely independent set of arguments to support the expansion in coverage that they seek. *New York Times* and its rationale, standing alone, fail to do the job.

III. RESOLVING HARD CASES

How, then, does one resolve the hard cases that arise after *New York Times Co. v. Sullivan*? It should come as no surprise to suggest that these cases require identification of the rationale on which *New York Times* was based. Let me reiterate, as a relatively uncontroversial working hypothesis, that the decision rested on Professor Meiklejohn's conception of the first amendment.²² That conception is based on a particular understanding of democracy—a belief that democracy consists of self-rule in the form of resolution by the citizenry of important questions of public policy.²³ “The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self-government.”²⁴ That conception owes a considerable debt to republican principles of civic virtue.²⁵ The underlying notion is that the political process is a forum for broad deliberation on public issues and that rights of speech and the press have a distinctive role to play in the deliberative process of which politics rightly consists.²⁶ It is that deliberative process, above all, that the first amendment protects.

It is not difficult to see that this conception of the first amendment does not describe the political process as it usually operates in the United States.²⁷ Broad deliberation tends to be unusual; power politics is the rule.²⁸ The republican conception, therefore, is an ideal toward which the right of free speech is meant to pave the

22. See *supra* note 16; see also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

23. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 53-60 (1966). For a discussion of this theme under many constitutional provisions, see Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. ____ (1984).

24. Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 252.

25. See H. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* (1981); W. SULLIVAN, *RECONSTRUCTING PUBLIC PHILOSOPHY* (1982); G. WOOD, *supra* note 23.

26. See H. ARENDT, *THE HUMAN CONDITION* 3-7 (1958).

27. See, e.g., R. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); Stigler, *The Theory of Economic Regulation*, 2 BELL. J. ECON. & MGMT. SCI. 3 (1971).

28. See *supra* note 27.

way. In *New York Times*, the Court was persuaded that the constitutional commitment to this ideal required severe inroads on defamation law insofar as it deterred speech directed at public officials. The reason is familiar and obvious. To the extent that libel law can be invoked against popular discussion of public issues, there will be much less discussion, and the republican ideal will be severely jeopardized. Under this framework, it is not difficult to envision the grounds for analyzing the issues of defamatory intent and falsity.

A. Defamatory Intent

The first question is whether proof of defamatory intent should be required when plaintiffs are public officials or public figures. Assume, for example, that a reporter publishes an article stating that Robertson, a presidential candidate, has taken certain positions on issues of public concern. Suppose too that the reporter is either recklessly indifferent to the truth or falsity of the statements or that he knows that they are false but publishes them anyway in order to increase sales. Suppose, finally, that the reporter did not know that the statements were defamatory because the report was published well before the candidate's supposed positions on the particular issues could cause significant damage to the candidate. The positions, for example, might relate to an issue that became sufficiently important to justify a damage award for defamation only after certain events had occurred in the outside world.

What social interest is there in protecting the reporter in these circumstances? Why should proof of defamatory intent be required in addition to proof of *New York Times* actual malice? At first glance, it is hard to see what is gained by requiring proof of defamatory intent. The argument, in short, is that once the plaintiff can show knowledge of falsity, or reckless indifference to falsity, the defendant ought to be forced to assume the risk that the speech has a defamatory character.

There are two responses to this conclusion. One response would be to emphasize that the system of litigation has an inherent risk of error.²⁹ As a result, true statements as well as false ones will be

29. See F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

penalized. But if that is a problem, it infects the *New York Times* standard as well. The actual malice standard, as it is currently administered, will inevitably catch some speakers who do not in fact have the required state of mind. But few think that such possibilities justify amending the *New York Times* standard to make it more protective. In any event, if the risk of judicial error is the problem, it is hard to see why an additional requirement of proof of defamatory intent is the solution.

Another response would be to argue that at least some statements that would be protected by a requirement of defamatory intent ought to be protected. Here Franklin and Bussel refer to ambiguous statements—claims that Jones is a “fascist” or a “crook.”³⁰ Such claims may be defamatory within the common law of libel because a certain percentage of listeners or readers will interpret them literally. These appear to be the cases about which Franklin and Bussel are especially concerned. But such cases can be resolved without establishing a general requirement of defamatory intent. First, the relevant speakers may not have actual malice within the meaning of *New York Times*. When a speaker calls a public official a “fascist,” he generally does so without the requisite knowledge of falsity. The term is ambiguous, hyperbole is omnipresent in public debate, and such statements are rarely meant literally. This reasoning is reflected in the cases.³¹ If the actual malice standard is satisfied, however, the statements should be protected, not with a defamatory intent requirement, but under a kind of “innocent construction” rule. If a speaker makes a statement that is generally or frequently interpreted by the public in a nondefamatory manner, it should probably be protected. Unlike the rule proposed by Franklin and Bussel, this approach would protect desirable speech without immunizing deliberate falsehoods.

In sum, I do not believe that plaintiffs should be required to prove defamatory intent as well as actual malice. First, such a requirement would protect speech that ought not to be protected, and it would remove a desirable chilling effect. Second, the speech that ought to be protected—hyperbole or ambiguous state-

30. See Franklin & Bussel, *supra* note 7, at 866-67.

31. See, e.g. *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). But see *Commonwealth v. Canter*, 269 Mass. 359, 168 N.E. 790 (1929).

ments—can be protected either through the actual malice standard itself or through a test that focuses on the objective meaning of the statement in question.

B. Private Plaintiffs and Truthfulness

The *New York Times* principle, of course, applies to suits brought by public officials or public figures. At least when public officials are involved, application of common law libel rules raises genuine constitutional problems. Such problems, in general, are also raised when one is dealing with nominally private citizens exercising significant power or involved in issues of public importance—a possibility that suggests that the Court seriously misstepped in the *Gertz* case.³² Those not formally associated with the government, of course, often play an important part in formulating public policy.³³ The test should focus, therefore, not on the existence of a formal connection with the government, but on the relationship of the plaintiff and the controversy to matters of public significance. When one is dealing with a private citizen and an issue of no public import, some of the important³⁴ first amendment concerns drop out. Under the first amendment, then, private citizens not engaged in public controversy need not prove either defamatory intent or falsity.

Franklin and Bussel are somewhat ambiguous in urging that true statements are always protected by the first amendment. Their claim appears to be that a state may not constitutionally treat as tortious statements that cannot be proved false—a conclusion that would do away with a good deal of state tort law concerning rights of privacy. That conclusion seems unacceptable in light of the strong interest in both privacy and reputation and the weakened

32. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

33. See, e.g., C. LINDBLOM, *POLITICS AND MARKETS* (1977); Tushnet, Book Review, 1984 *Wis. L. Rev.* 129 (reviewing M. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983)).

34. The first amendment is of course importantly concerned with things other than self-government, even if that concept is defined, as it should be, in very broad terms. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 *UCLA L. Rev.* 915 (1978). The autonomy principle, for example, means that the first amendment is at least applicable even when public issues are not at stake. But it is impossible, I think, to formulate a coherent body of first amendment doctrine without recognizing that whether speech involves public affairs, broadly defined, is highly relevant to the extent of constitutional protection.

first amendment concerns when self-government, even in the broadest sense, is not plausibly at stake. On the other hand, Franklin and Bussel may be urging only that the law of defamation may not be applied to true statements—a conclusion that would leave state law protecting rights of privacy unimpaired. But this conclusion also seems unacceptable, for the label that a state chooses to use should not matter in assessing constitutionality.

On the other hand, when the plaintiff is a public official or public figure, or a private citizen embroiled in an issue of public importance, the general rule ought to be that there can be no liability for statements that cannot be proved false. The interest in free discussion is sufficiently important to justify at least a strong presumption against allowing damages for statements that cannot be shown false, and the competing interest of the plaintiff is sufficiently weak when false statements are not at issue.³⁵

The only troublesome cases arising in this category involve disclosures that are not of genuine public interest. Consider, for example, the disclosure of embarrassing facts about the private life of an actor, an athlete, or perhaps a low-level public official. To be sure, the likelihood that such disclosure will bear on issues of genuine public import is increased when they concern a public official, a private person involved in public affairs, or perhaps even a public figure. But it is easy to imagine cases in which one has gone far afield from the *New York Times* conception of what the first amendment is about. In such cases, I believe that disclosures of private facts are actionable even if the plaintiff falls within the basic protection of the *New York Times* case. Indeed, one might well go further and question the current broad definition of “public figures,” under which first amendment protection has been applied to bar recovery by many who are not by any standard engaged in the process of governance.³⁶

IV. CONCLUSION

It should come as no surprise to find that one's view of the hard

35. I put to one side the important point that, under the cases, speech is often rightly protected even though it is falsifiable—as in the hyperbole context. “Fact” and “opinion” thus operate as labels for conclusions based on a host of considerations.

36. See Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984).

cases that arise after *New York Times* will depend largely on one's conception of the underlying function of the first amendment. To the extent that one associates the first amendment with the principles of collective self-determination, one will be inclined to regard private plaintiffs as altogether different from public plaintiffs. And although the line-drawing problem may be formidable, there seems to be at least a core of cases in which the strongest sorts of first amendment protection should not attach. The existence of hard intermediate cases is never a good reason for rejecting an otherwise sensible distinction. Similar considerations make me unwilling to believe that *New York Times* justifies a conclusion that statements that cannot be proved false are always protected, although that should be the general rule.

The most difficult issues discussed here relate to the need for proof of defamatory intent in suits brought by public officials. The danger of a chilling effect may be significant, but the question must always turn on the sort of thing that is being chilled. What makes the defamatory intent problem difficult is that it is possible to imagine cases that fall on both sides of the line: those in which one is chilling speech which there is no public or private interest in promoting; and those in which the chilling effect is imposed against statements that, although false, ought to be permitted. There is, in addition, the familiar problem of the errors built into the system of litigation. I have suggested that proof of defamatory intent should not be required, and that one can protect desirable speech through other means.

I conclude with one additional note. *New York Times Co. v. Sullivan* was rightly decided and—perhaps more important—it rested on a conception of the first amendment that ought to command widespread support. But that conception contains inherent limits. In the hard cases that arise after *New York Times*, those limits occasionally have been transgressed. When resolving the hard cases, it is important to avoid talk of a chilling effect in the abstract, or of the need to resolve the general conflict between the interest in reputation and the competing interest in free expression.³⁷ Both interests are important; both are rightly accorded constitutional status. In such circumstances, and in the hard defama-

37. This is, of course, a reference to the methodology discussed by Ronald Dworkin in the

tion cases, the task is to focus on the precise nature of the harms to the relevant interests, and on whether the chilling effect might curb speech that we have good reason to protect.

essay from which this Commentary takes its title. *See* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).